



Law Society
of Scotland

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Call for Evidence

Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill

13 November 2019



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Environment Climate Change & Land Reform Committee's Call for Evidence on the Animals and Wildlife (Penalties, Protections and Powers) (Scotland) Bill (the Bill).¹ The committee has the following comments to put forward for consideration.

General

The Bill, by proposing amendments to the existing statutes, focuses on:

- increasing the maximum available sentences in relation to a range of offences concerning animal health and welfare and wildlife
- providing regulatory powers for the issuing of fixed penalty notices
- providing authorised persons with new powers regarding animals taken into their possession.

Many of the proposed changes in the Bill will affect the Animal Health and Welfare (Scotland) Act 2006 (2006 Act) that was described as an "important landmark for animal welfare in Scotland as it consolidated previous animal welfare legislation."² Consolidation of legislation is important as it allows those interested, whether they are an enforcement authority or an interested member of the public, to be able to locate the relevant legislation that affects them in one place. It may be timely too to reflect on the 2006 Act as it has been in force for over ten years to ascertain that the legislation is up to date and continues to be appropriate.

Before the Bill's introduction, we had responded to the Scottish Government when they consulted in advance on making a number of changes to the 2006 Act³ and Wildlife Crime Penalties.⁴ There is

¹ https://www.parliament.scot/S5_Bills/Animals%20and%20Wildlife%20Bill/SPBill56S052019.pdf (as introduced)

² Paragraph 8 of the Policy Memorandum https://www.parliament.scot/S5_Bills/Animals%20and%20Wildlife%20Bill/SPBill56PMS052019.pdf

³ <https://www.lawscot.org.uk/media/362508/26-04-2019-crim-amendments-to-the-animal-health-welfare-scotland-act-2006.pdf>

⁴ <https://www.lawscot.org.uk/media/363313/2019-08-15-crim-wildlife-crime-penalties-002.pdf>

conterminously with the passage of this Bill an ongoing consultation “The Animal Health Act 1981 Amendment Consultation”⁵ that is seeking to establish if fixed penalty notices (FPN) should be introduced for less serious animal health offences.

The Bill includes potential powers to bring forward by means of secondary regulations the issue of FPNs for both animal welfare and animal health matters. The principle of introducing these regulatory powers is, in effect, similar. However, as was recognised in paragraph 108 of the Policy Memorandum, the current consultation has not yet concluded. There is an expectation that amendments to the Bill will be needed following the conclusion and analysis of the consultation responses. We would agree that this approach and practice is “slightly unusual.”⁶

It might have been best for the consultation on animal health to have concluded before the Bill’s introduction. That would have allowed for as comprehensive a view as possible of what the landscape around enforcement of the Bill’s measures will be after the legislation is reformed.

In principle, though, we support the increased flexibility which would be provided by having the power to issue FPNs for lower level offending when seeking to enforce these measures. Our answer to Question 9 addresses this aspect more fully.

We would respond to the questions as follows:

Penalties (for animal and wildlife offences)

Question 1: Are there specific examples where existing maximum penalties have been insufficient?

Question 2: Are the proposed maximum penalties set at the right level to act as a deterrent?

Question 3: Do the proposals on wildlife penalties fully address the recommendations of the Poustie review on penalties?

⁵ <https://consult.gov.scot/animal-welfare/animal-health-act-1981/which-closes-on-23-december-2019>.

⁶ Environment, Climate Change and Land Reform Committee 29 October 2019
<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12328>

Much of the Bill is concerned with increasing the range of sentencing options in relation to a number of offences. It is important to note that the Bill does not create any new offences.

We understand and support the proposed increase in sentencing powers as these amendments will widen the scope of prosecutorial options to allow certain offences to be tried on indictment where the circumstances of the cases merit this. There is sense in ensuring that where cases are sufficiently serious that these should be able to be tried at sheriff and jury level which is not an option available at present.

Reference was made in both earlier consultations⁷ to a number of animal cruelty cases having attracted media attention because the offences were so shocking, and the maximum available sentences were not sufficient. Further detailed information was not provided. Accordingly, in both our consultation responses, we suggested that by providing examples of cases which demonstrated an evidential basis, including judicial observations from such cases, would have assisted in justifying the reasons for the proposed sentencing increases.

In the absence of that evidence, it is difficult for us to advise where any of the existing maximum penalties are insufficient. We would suggest that those involved in animal welfare and wildlife matters would be best placed to advise on a sliding scale of seriousness of the relevant offences and what should be the appropriate penalty. What is important to stress is that any penalty that is imposed must be commensurate with the seriousness of the offence as well as being appropriate in the circumstances of the accused.

What does seem to be absent from the Bill's Policy Memorandum is the rationale justifying the differentiation in the varying penalties. That does not seem to have been fully addressed except in so far as there is a basic need to increase them. Where the changes have included provision for proceeding on indictment, that is easier to understand as the Crown Office and Procurator Fiscal Service (COPFS) has the discretion in deciding in which forum⁸ that any prosecution should be initiated. That decision will be based on the facts in any specific case reported to them. Providing more information on that rationale would assist in the understanding of the effect of the Bill and evaluating or measuring its impact in due course.

What is a recurring theme in relation to the Bill is the need for better public understanding and knowledge in relation to the offences and, the perceived seriousness of the offences. This is relevant to promoting the public's understanding of the sentence that is imposed and in providing a deterrent as to any future offending behaviour. It also assists the sheriffs who are responsible for sentencing in the cases appearing before them.

Sentencing in some cases may be straightforward but given that other offences may arise infrequently, just how serious they are on a scale will depend on information provided by those reporting such cases and

⁷ <https://www.lawscot.org.uk/media/362508/26-04-2019-crim-amendments-to-the-animal-health-welfare-scotland-act-2006.pdf>

<https://www.lawscot.org.uk/media/363313/2019-08-15-crim-wildlife-crime-penalties-002.pdf>

⁸ subject to sufficient admissible evidence

could for instance include comparative information from England and Wales where sentencing guidelines have existed for some time.

What would have been helpful for Scotland would be the issue of Sentencing Guidelines from the Scottish Sentencing Council (SSC) who recognised that there would be a public⁹ benefit in issuing guidance on this topic as:

“sentencing wildlife offences can be quite different from the majority of criminal offences, particularly with regard to the assessment of culpability and harm. For example, there may be a public policy aspect to some cases, where the harm or the risk of harm is to the public at large rather than to an identifiable (human) victim, or indeed to another animal. In addition, the offender may be a company rather than an individual.”¹⁰

Though the SSC has undertaken some research, we understand that the preparation of these guidelines has been delayed.

Even with the Bill’s proposed increase in the sentencing powers, such powers they need to be used where appropriate. The role of the SSC is important as they are the best placed to issue guidelines to:

- ensure consistency in sentencing
- assist in the development of sentencing policy
- promote greater awareness and understanding of sentencing.

The Judicial Institute for Scotland has a role in providing judicial education that may be able to raise awareness and potential use of the relative sentencing powers.

In sentencing too, the Proceeds of Crime Act 2002¹¹ should also be considered as there is a potential for claw-back for money that has been made in relation to criminality. Recognised links have been identified between puppy-farming and serious and organised crime as illustrated in the Manchester case¹² where it was believed the animals had been imported from across Europe and sold on as part of the group’s organised business. Similarly, in the Sentencing Wildlife Trade Offences in England and Wales, it stated that:

⁹ For Scottish communities and economies

¹⁰ <https://www.scottishsentencingcouncil.org.uk/sentencing-guidelines/methodology/stage-1-initial-consideration-of-the-guideline-topic/>

¹¹ Environment, Climate Change and Land Reform Committee 29 October 2019
<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12328>

¹² <https://www.manchestereveningnews.co.uk/news/greater-manchester-news/crackdown-puppy-dealers-sees-three-9784788>

“In recent years there has been growing evidence that that there are connections between the wildlife trade and serious organised crime, and it is now generally accepted that some wildlife trade, particularly at the international level, involves organised crime groups and trafficking networks.”¹³

In relation to the practical impact of the proposed increase in sentencing provisions, there is a need to remember the effect of the Presumption Against Short Periods of Imprisonment (Scotland) Order 2019¹⁴ (that affects convictions on or after 4 July 2019) where there is a statutory presumption that a court must not pass a sentence of imprisonment for a term of twelve months or less, unless the court considers that there is no other method of dealing with the person was appropriate.

Question 4: Are the proposals for treatment of service animals necessary and appropriate?

We support these proposals. We understand the background that relates to the introduction of these measures which replicates Finn’s law from England and Wales case where the police dog, Finn sustained severe stab wounds to the chest and head, but only criminal damage charges could be brought against the suspect¹⁵.

These propose amending section 19 of the 2006 Act in a similar manner to the changes that were made in England and Wales with effect from 8 June 2019. What these changes mean is the removal of the self-defence so that it is not available in cases where attacks have been made on police animals such as dogs or horses during their duties.

Question 5: Will the proposals have implications for how evidence is gathered and treated?

We assume that this question is intended to refer to the proposed changes in the statutory time limit for wildlife crime offences. That sets out that these may be prosecuted under summary procedure only, e.g. the intentional or reckless taking, damage or destruction of nests under section 1(1)(b) of the Wildlife and Countryside Act 1981, should be increased to six months from which sufficient evidence came to the knowledge of the prosecutor, but no more than three years from the date of the offence. We understand the reasoning set out in the Policy Memorandum regarding the evidence that needs to be gathered in¹⁶

¹³ (quoted in Sentencing Wildlife Trade Offences in England and Wales Consistency, Appropriateness and the role of Sentencing Guidelines Cook, Roberts & Lowther, 2002; Cowdrey, 2002; UNEP, 2014; UNODC, 2010; Zimmerman, 2003). <https://www.wwf.org.uk/sites/default/files/2017-01/WWF-UK%20Report%20-Sentencing%20wildlife%20trade%20offences%20in%20England%20and%20Wales.pdf>

¹⁴ <http://www.legislation.gov.uk/sdsi/2019/9780111042281/contents>

¹⁵ Paragraph 35 of the Bill’s Policy Memorandum

¹⁶ Paragraph 46 of the Policy Memorandum

given the complex nature of the offences where it can be challenging to obtain all the required evidence within the current timescales. Relaxing that time limit reflects the balance between evidence gathering and the rights of the accused to a fair trial within a reasonable period.

The proposals therefore seem appropriate and in line with other types of offences which rely on information that may take time to be gathered and assessed for the purposes of assessment for prosecution.

New powers for enforcement agencies without a Court Order

Question 6: Are the proposals to allow enforcement agencies to intervene without a need for a court order necessary and appropriate?

We understand that it is in the best interests of the animal that such matters are dealt with promptly and the enforcement agencies given early intervention powers.

However, there needs to be fairness in the procedures being adopted in accordance with Article 6 of the ECHR. Challenges by way of appeals are only possible by means of section 32D of the Bill where an appeal must be made if appropriate within three weeks of the date of the service of the decision notice. There is no further appeal mechanism beyond the original appeal. There is a question whether any further appeal mechanism should be included.

Given these powers, we wonder whether the first right of any person to object should in fact require an appeal. It should not be necessary, as proposed, for an affected person to raise an appeal. There are various examples of existing court processes where access to a court requires to be made urgently. Examples include interim interdict hearings, detention of cash under the proceeds of crime legislation and summary applications. These are all interim measures which all require ratification by the court in due course.

Any new process that is introduced to resolve issues such as this will need to consider if automatic legal aid or ABWOR is required so that individuals can be represented at the earliest stages of proceedings. The time period in which appeals could be made which are set at three weeks may well be much too short.

Question 7: What impact will the proposals have on: local authorities; animal welfare agencies, sanctuaries and rehoming centres; commercial businesses, individuals and; the welfare of different types of animal?

We would suggest that this question is best answered by the relevant organisations.

Compensation

Question 8: Are the proposals to pay compensation to an owner necessary and appropriate?

We would suggest that this question is best answered by those more directly involved in assessing the payment of compensation which fall to be paid under section 32G of the Bill once powers are being exercised under section 32A of the Bill. Provision of legal aid may also be an appropriate question to be considered here. We refer to our observations in response to Question 6.

Our concern around compensation would stem around the use of these provisions in any other circumstances other than commercia. How would you value an animal who is a loved and valued pet?

Fixed Penalty Notices

Question 9: Will Fixed Penalty Notices act as a deterrent and how should they be used to maximise their positive impact on animal welfare?

Fixed Penalty Notices (FPN) should only be available to be used in respect of minor or lower level offences. We agree that these can provide a proportionate means of dealing with minor types of offending. However, much depends on exactly why and the underlying purpose of them being used. Regulatory offences such as animal welfare may provide good examples where FPNs may provide an effective and prompt way of dealing with people.

Is it intended that FPNs can also be levied on companies or other corporate entities or charities who may be involved with animals?

Exactly how far FPNs will be used awaits clarification as we note that there was an indication given that they would be aimed at:

“offences that do not necessarily involve harm to individual animals, in the context of our attempts to improve overall compliance with legislation to benefit animal health and welfare more widely.”¹⁷

There was also a suggestion that they may be used in relation to the introduction of measures which do not currently appear in the Bill of:

¹⁷ Environment, Climate Change and Land Reform Committee 29 October 2019
<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12328>

“legislation [aimed at require[ing] licensing of animal sanctuaries and rehoming centres and to modernise licensing for dog breeding and pet sales, and there might be paperwork offences, such as not applying for a licence or not holding one, which would not necessarily involve an animal being harmed. It is important that overall compliance with the regulations is achieved.”¹⁸

We support the flexibility of FPNs in dealing with low level offending and adding to the suite of enforcement measures. It is important to make people face up to their criminality in general but not simply to seek to tax them on their criminal behaviour. It may also be useful to consider the number of FPNs that will remain unpaid.

Regarding the issue of FPNs to be issued by police officers and inspectors, training would need to be provided for inspectors before such new powers are introduced.

We assume that there is also the intention to allow the Crown Office and Procurator Fiscal Office to issue fixed penalties too in respect of cases where they felt that this was an appropriate use of their discretion.¹⁹ and involve their use of an alternatives to prosecution.

We note the powers to make regulations to bring in the introduction of the issue of FPNs. These are subject to affirmative parliamentary procedure which seems appropriate.

Question 10: Any further issues or views not falling under the above areas?

We have nothing more to add. We are aware of several other aspects which have not been included which are being dealt with by the Minister of Rural Affairs and the Natural Environment that include the Scottish Animal Welfare Commission, licensing of animal breeding, pet sales and sanctuaries, fox hunting and wildlife welfare issues, public safety and dog control. We look forward to hearing more about progress regarding these matters and any timescales.

¹⁸ Environment, Climate Change and Land Reform Committee 29 October 2019
<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=12328>

¹⁹ <https://www.copfs.gov.uk/about-us/what-we-do/10-about-us/297-alternative-to-prosecution>



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